

## Ways the Legislature could clarify the attorney general's authority

### **OPTION FOR LEGISLATION #1: Reinforce the Supreme Court's rulings that the attorney general has only the authority expressly granted by statute.**

**EXPLANATION:** Washington's constitution provides that:

The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.

Const. art. III, § 21. Twice the Washington Supreme Court has construed the phrase "prescribed by law" and concluded it means the officer has no authority except what is expressly granted by statutes. *Yelle v. Bishop*, 55 Wn.2d 286, 295-96, 347 P.2d 1081 (1959); *State ex rel. Winston v. Seattle Gas & Electric Co.*, 28 Wash. 488, 497, 68 P. 946 (1902).

Nonetheless, the present attorney general does not believe the Washington Supreme Court has spoken definitively on this issue, therefore he says his office may have common-law powers after all. He has also argued that his actions cannot be halted by the Supreme Court unless a statute explicitly prohibits the action he has taken. In other words, the Legislature would have to spell out all the things he is not authorized to do.

**POSSIBLE AMENDMENTS:** Amend the introductory part of RCW 43.10.030 as follows:

The attorney general, having only those powers expressly granted by statute, shall: . . .

### **OPTION FOR LEGISLATION #2: Add language to RCW 43.10.030(1) that clarifies the attorney general cannot act unilaterally but rather must either have express authority over the subject matter of the case or be requested to act by a state officer who has substantive authority.**

**EXPLANATION:** The primary statute granting the attorney general authority is RCW 43.10.030 (complete copy attached). The first section provides that the attorney general shall:

- (1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

Although section (1) is plainly limited to appearances in appellate courts, the current attorney general argues that the phrase "in all cases in which the state is interested" means the attorney general has broad independent authority to determine when the state's interests are at stake and to act as he deems appropriate, regardless of the type or level of tribunal. He also argues this section authorizes him to act without an agency or officer as a client and even over the objections of officers with authority over the subject matter of a case.

The statute was originally enacted before Washington became a state. The rationale for limiting the attorney general to appearances in appellate courts is not apparent in today's circumstances. The provision could be broadened to authorize the attorney general to appear in all cases, regardless of the type or level of tribunal, as long as the exercise of such authority is limited to matters over which he has substantive authority or his client has substantive authority.

**POSSIBLE AMENDMENTS:** Amend RCW 43.10.030(1) as follows:

(1) Appear for and represent the state ~~before the supreme court or the court of appeals~~ in all cases in which the state is interested when another statute grants the attorney general authority regarding the subject matter of the case or when requested to do so by a state officer with authority over the subject matter;  
;

**OPTION FOR LEGISLATION #3: Add language to RCW 43.10.030(2) to clarify that it grants the attorney general authority to initiate a case when necessary to execute another state officer's duties, not the attorney general's own duties.**

**EXPLANATION:** The second section of RCW 43.10.030 provides the attorney general shall:

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

The present attorney general argues this section grants him authority to initiate a case when he deems it necessary to fulfill his own duties as a state officer, even if no statute expressly authorizes him to act regarding the subject of the case and no state officer has asked him to act. His interpretation is effectively a grant of unlimited authority, since he could always argue that his actions were necessary to execute his own duties.

**POSSIBLE AMENDMENTS:** Amend RCW 43.10.030(2) as follows:

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any other state officer, upon request by that officer;

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**OPTION FOR LEGISLATION #4: Clarify that RCW 43.10.040 was intended to make the Attorney General's Office the exclusive law firm for state agencies and officers – not to grant the attorney general unlimited authority to act for the state whenever and wherever he deems appropriate.**

EXPLANATION: In 1941 the Legislature enacted a statute that barred most state agencies and officers from hiring their own legal counsel and made it the attorney general's duty to provide them legal representation. A complete copy of that statute is attached. The present attorney general isolates the first section of the statute from the rest and argues it was a grant of blanket authority for the attorney general to appear whenever and wherever he deems appropriate, with or without an agency or officer as a client, and even if the governor and the state officers with authority over the subject matter of the case object.

The current attorney general also believes he may decline to represent a state agency or officer, even though they are prohibited from hiring their own legal counsel. The attorney general should only be able to refuse to provide legal counsel when a matter would be considered "frivolous" by the courts. Rather than referring to a current court rule by number, the language inserted below uses the criteria in Civil Rule 11 that indicates a matter should not be filed in court.

POSSIBLE AMENDMENTS: Amend RCW 43.10.040 as follows:

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, when a statute grants the attorney general authority over the subject matter or a state officer with authority over the subject matter requests representation. The attorney general may decline to provide such representation only if the matter is not well grounded in fact, or not warranted by existing law or a good faith argument for a change in law, or is interposed for an improper purpose such as to harass another party or to cause unnecessary delay or increased litigation costs. The attorney general shall ~~and~~ advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

## ATTACHMENTS

### RCW 43.10.030

General powers and duties.

The attorney general, having only those powers expressly granted by statute, shall:

(1) Appear for and represent the state ~~before the supreme court or the court of appeals~~ in all cases in which the state is interested when another statute grants the attorney general authority regarding the subject matter of the case or when requested to do so by a state officer with authority over the subject matter;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any other state officer, upon request by that officer;

(3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he or she shall attend the trial of any person accused of a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;

(9) Keep in proper books a record of all cases prosecuted or defended by him or her, on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his or her successor in office;

(10) Keep books in which he or she shall record all the official opinions given by him or her during his or her term of office, and deliver the same to his or her successor in office;

(11) Pay into the state treasury all moneys received by him or her for the use of the state.

Original statute enacted in 1941, a part of which is now codified as RCW 43.10.040.

SESSION LAWS, 1941.

[CH. 50.]

## CHAPTER 50.

[S. B. 102.]

### POWERS AND DUTIES OF THE ATTORNEY GENERAL.

AN ACT relating to the powers and duties of the Attorney General; providing for the legal representation of the State of Washington and departments, commissions, boards, agencies, and administrative tribunals thereof and providing for the appointment of certain personnel therein, excepting certain state agencies; repealing all acts or parts of acts in conflict herewith; and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. In addition to the powers and duties now given the Attorney General of the State of Washington by law, he shall also have the power, and it shall be his duty, to represent the State of Washington and all officials, departments, boards, commissions and agencies of the State of Washington in the courts and before all administrative tribunals or bodies of any nature in all legal or quasi legal matters, hearings or proceedings, and to advise all officials, departments, boards, commissions or agencies of the State of Washington in all matters involving legal or quasi legal questions, except where it is otherwise provided by law to be the duty of the Prosecuting Attorney of any county; and it shall be the duty of the Attorney General of the State of Washington, and he shall have the power, to employ or discharge sufficient attorneys and clerks to transact for the State of Washington, its departments, officials, boards, commissions and agencies, all business of a legal or quasi legal nature, except where it is provided by law to be the duty of the judge of any court, or the Prosecuting Attorney of any county, and the Attorney General shall fix the salary and compensation for all such attorneys and employees, and in the event such attorneys or employees are assigned to any department, board

or commission, such department, board or commission shall pay the salary or compensation of such persons, as fixed by the Attorney General, not exceeding the funds made available to the department by law for legal services.

SEC. 2. No officer, official, director, administrative agency, board or commission of the State of Washington, other than the Attorney General, shall employ, appoint, or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties set forth in this act, except where it is provided by law to be the duty of the judge of any court or the Prosecuting Attorney of any county to employ or appoint such persons.

SEC. 3. The Attorney General shall have the power to employ from time to time such skilled experts, scientists, technicians or other specially qualified persons as he may deem necessary to aid him in preparing for the trial of actions.

SEC. 4. This act shall not apply to the administration of the Judicial Council, the State Law Library, the law school of the University of Washington, or the administration of the state bar act by the Washington State Bar Association, as provided in chapter 126, Laws of 1921 and chapter 94, Laws of 1933.

SEC. 5. If any section, clause, sentence or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the Legislature hereby declares it would have enacted this act if such section, clause, sentence or phrase were omitted.

SEC. 6. This act is necessary for the immediate support of the state government and its existing